DEC 10 1999

No. 99-138

Supreme Court, U.S.
FILED
DEC 10 1999
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of the Visitation of NATALIE ANNE TROXEL AND ISABELLE ROSE TROXEL, Minors, JENIFER AND GARY TROXEL, *Petitioners,*

v.

TOMMIE GRANVILLE, *Respondent.*

On Writ of Certiorari
to the Supreme Court of Washington

BRIEF *AMICUS CURIAE* OF THE AMERICAN CENTER FOR LAW AND JUSTICE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

Does Washington's visitation statute, which permits the state to intrude into the private child-rearing decisions of fit parents who are raising children in an intact family, violate the Due Process Clause's guarantee of parental autonomy?

Assuming as Petitioners claim, that this case raises a facial challenge to Washington's visitation statute, should this Court employ the history and traditions analysis adopted in other substantive Due Process cases to determine the scope of parental rights?

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BRIEF *AMICUS CURIAE* OF THE AMERICAN CENTER FOR LAW AND JUSTICE SUPPORTING RESPONDENT

INTEREST OF AMICUS*

The American Center for Law and Justice (ACLJ) is a nonprofit, public interest law firm and educational organization dedicated to protecting First Amendment freedoms, human life, and the family. ACLJ attorneys have argued or participated as amicus curiae in numerous cases involving constitutional issues before the United States Supreme Court and lower federal courts, and Chief Counsel Jay Sekulow has presented oral argument before this Court in the following cases: *Schenck v. Pro-Choice Network of*

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* Counsel of record for the parties in this case have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, the ACLJ discloses that no counsel for any party authored in whole or in part this brief and that no monetary contribution to the preparation of this brief was received from any person or entity other than *amicus curiae*.

Western New York, 519 U.S. 855 (1997); *Lamb's Chapel v. Center Moriches Union Free School Board,* 508 U.S. 384 (1993); *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263 (1993); *Board of Education of Westside Community Schools v. Mergens,* 496 U.S. 224 (1990); *United States v. Kokinda,* 497 U.S. 720 (1990); and *Board of Airport Commissioners v. Jews for Jesus,* 482 U.S. 569 (1987). Also, the ACLJ presently has pending before this Court two cases to be argued this term: *Hill v. Colorado,* No. 98-1856, and *Santa Fe Independent School District v. Doe*, No. 99-62

As an organization dedicated to protecting the family, the ACLJ is generally opposed to government intervention in the parent-child relationship absent a showing of parental unfitness. Petitioners have invited the Court to address the parameters of parental rights under the Due Process Clause of the Fourteenth Amendment, and any Court pronouncements on the scope of parental rights will have significant ramifications on the parent-child relationship. The ACLJ urges the Court to employ the history and traditions analysis appropriate in substantive due process cases under *Washington v. Glucksberg,* if the Court determines that this case requires it to clarify the scope of parental rights. In addition, the ACLJ argues that the lower court properly held that Washington Revised Code § 26.10.160, which grants the state expansive authority to intrude into the private child-rearing decisions of fit parents, violates the Due Process Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

The ACLJ adopts the statement of the case set forth in Respondent's brief.

SUMMARY OF THE ARGUMENT

Parental rights have a pedigree unmatched in constitutional law. As one of the only pre-constitutional rights recognized by this Court under the Due Process Clause of the Fourteenth Amendment, parental rights have been deemed one of the most sacred liberties in our nation. When this Court first acknowledged parental rights in 1923, society and its traditions were relatively homogenous with respect to the proper means of creating and raising children. There was little if any need to define the scope of parental rights. Since *Meyer* and *Pierce*, society has changed dramatically, of course, and several cases have come before this Court raising issues concerning the scope of parental rights in circumstances as common now as they were uncommon at the time of *Meyer* and *Pierce*. *See, e.g., Michael H. v. Gerald D.,* 491 U.S. 110 (1991).

In this case, the Court has been invited to define the perimeters of parental rights in a manner which reflects the current condition of the family in America. If the Court accepts that invitation, the proper analytical framework for considering the scope of parental rights is the history and traditions analysis employed in this Court's substantive due process jurisprudence. Specifically, the contours of parental rights should be set by first describing the interest at stake with particularity, and then by examining the history and traditions giving rise to that interest. *See Washington v. Glucksberg,* 521 U.S. 702, 719 (1997). When carefully described in the light of history and tradition, parental rights are properly viewed as rights correlative of duties borne out of the reciprocal relationships in intact families. The right to raise one's children historically has been seen as the broader right to family integrity, because parental rights are relational rights originating in the family, not in the individual parent. This Court's cases consistently have extolled the family as the foundational unit of society and therefore the fountainhead of parental rights. *See, e.g., Michael H. v.*

Gerald D., 491 U.S. 110 (1991); *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

When the scope of parental rights are correctly delineated in light of their historical backdrop, the unconstitutionality of Washington's visitation statute is manifest. The statute confers an unprecedented degree of power on the state to intrude itself into the private child-rearing decisions of intact families. Requiring only a finding that "the best interests of the child" are furthered, Washington's visitation statute empowers state courts to substitute their judgments for that of fit parents about who can maintain relationships with, and therefore influence the morals and values of, the parents' children.

Parental rights historically have only been subject to state intrusion when parents are harming or threatening harm to their children. The requirement of harm is the only safeguard that parents have against the sort of pervasive state interference in parenting decisions authorized by Washington's visitation statute. In the absence of harm to the child, the state has no authority to intrude into the parenting process. The lower court properly held Washington's visitation statute unconstitutional.

ARGUMENT

I. Parental Rights Are At Their Fullest And Should Be Most Shielded From State Interference Where, As In This Case, Parental Responsibilities Have Been Consistently Discharged and The Child Lives With A Fit Unitary Family.

Parental rights are most unassailable when parents fulfill their duty to raise their children in a stable home. The history and culture of American, and indeed much of western, civilization has extolled the primary role of parents

in raising children. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). Rooted in history and tradition as they are, parental rights are protected under the Fourteenth Amendment's Due Process Clause. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 533 (1925). A parent's right to the care and companionship of his child is so cherished that the right may not be terminated in the absence of stringent procedural safeguards. *See, e.g., Santosky v. Kramer*, 455 U.S. 745 (1982) (due process requires that parental rights may not be terminated unless state shows at least clear and convincing evidence that parents are unfit); *MLB v. SLJ*, 519 U.S. 102 (1996) (parental rights are of such basic importance that due process is violated when mother lost opportunity to appeal order terminating her parental rights because she could not pay appeal costs).

This Court's decisions in *Meyer* and *Pierce*, recognizing the Due Process Clause's protection of parental rights, were decided at a time in this nation's history when the vast majority of children were born into a traditional family created by marriage between a man and woman. There was, comparatively speaking, a fair degree of moral consensus about how children should be brought into the world and how they should be raised. Defining the scope of parental rights undoubtedly would have seemed unnecessary in a nation bereft of rampant illegitimacy, varied reproductive technologies, and numerous alternative lifestyles.

In modern times, however, this Court's decisions have recognized that the Due Process Clause does not confer unqualified parental rights on every person who bears or sires a child. For example, in both *Quilloin v. Walcott*, 434 U.S. 246 (1978) and *Lehr v. Robertson*, 463 U.S. 248 (1983), the Court declined to hold that unwed fathers had full parental rights where the fathers never shouldered any significant responsibility for the child's well-being. In

Michael H. v. Gerald D., 491 U.S. 110 (1991), the Court held that a single man who fathered a child in an adulterous affair did not have full parental rights with respect to that child. 491 U.S. at 123-25.

Petitioners assert that this case raises questions similar to that raised in *Michael H.*, concerning the scope of parental rights under the Due Process Clause, because this case involves a facial challenge to § 26.10.160(3). According to Petitioners,[1] the issue before this Court is whether there is any set of circumstances under which the statute would be constitutional. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). Assuming this case raises a facial challenge to § 26.10.160(3) and therefore raises questions about the perimeters of parental rights, the appropriate method of determining those perimeters is the history and traditions analysis employed in this Court's cases addressing substantive due process rights. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 719 (1997); *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992) (The nation's history, legal traditions, and practices provide the "crucial guideposts for responsible decisionmaking").

A. The Contours of Parental Rights Must Be Defined In the Light of the History and Traditions Which Gave Rise to Those Rights.

As a substantive due process right, the scope of a parent's right to raise his child must be delineated in the light of the history and tradition which gave rise to the right. *See Washington v. Glucksberg*, 521 U.S. 702, 719 (1997).

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[1] See Troxel Br. At 19. Nothing in the lower court's opinion indicates that respondent pursued a facial challenge to Wash. Rev. Code § 26.10.160(3).

Substantive due process analysis has two components. First, a thorough review of the nation's history and tradition is required to determine whether the asserted right is "so rooted in the traditions and conscience of our people as to be ranked fundamental." *Id.* at 719. Second, there must be a "careful description of the asserted fundamental liberty interest." *Id.* (Court held that the right asserted was properly described as the "right to commit suicide," not the more general and vague "right to choose a humane, dignified death").

As *Meyer* and *Pierce* held, the general concept of parental rights is firmly rooted in the tradition and history of this nation. 262 U.S. at 399; 268 U.S. at 533. What *Meyer* and *Pierce* did not discuss, quite understandably given American society at that time, was the second prong of substantive due process analysis, how the asserted interest should be described in various contexts. In *Michael H. v. Gerald D.*, 491 U.S. 110 (1991), a plurality of the Court addressed, for the first time, the question whether the scope of parental rights depends on the circumstances surrounding the parenthood. There, a single man, Michael, fathered a child through an adulterous affair. The child was born into an intact family, and her legal father, Gerald, acknowledged her as his own. Nevertheless, over much of the child's early years, Michael maintained a fatherly relationship with her and held her out as his own, even while Gerald did the same. A blood test established that the child was Michael's. 491 U.S. at 113-114. When the child's mother and Gerald wanted to stop all further contact between the child and Michael, Michael argued that his parental rights under the Due Process Clause were infringed by California's evidentiary rule barring Michael from challenging the child's legitimacy. *Id.* at 116.

Presaging *Glucksberg*, the plurality's analysis incorporated a careful and very specific description of Michael's asserted liberty interest. Rejecting a general characterization of Michael's claim as a parental rights

claim, the plurality confined its inquiry to the nation's historical traditions regarding the rights of an "adulterous natural father." *Id.* at 127 n.6.

Michael had argued that the Court's cases conferred parental rights on parents whenever there was biological parenthood plus an established relationship. *Id.* at 123 (citing *Stanley v. Illinois*, 405 U.S. 645 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Lehr v. Robertson,* 463 U.S. 248 (1983)). The plurality rejected this characterization of the Court's cases, holding instead that its decisions rested "upon the historic respect–indeed, sanctity would not be too strong a term–traditionally accorded to relationships that develop within the unitary family." *Id.* at 123. The plurality cited *Stanley* as an example of the Court's solicitude for family integrity because the Court struck down a state's attempt to remove a deceased mother's children from the custody of their father who had lived with and supported the children for 18 years. *Id.*; *see also Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality) ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is firmly rooted in this Nation's history and tradition.").

The plurality also noted that throughout the nation's history, states had protected intact families against the sort of claim Michael asserted.

> What counts is whether the States in fact award substantive parental rights to the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child. We are not aware of a single case, old or new, that has done so. This is not the stuff of which fundamental rights qualifying as liberty interests are made."

Id. at 125.

Section 26.0.160(3) is a very broadly worded statute which confers the right on "any person," "at any time," to seek visitation with a child, regardless of the child's familial status. Section 26.0.160(3) is unconstitutional as applied to Tommie Wynn. Resolving a facial challenge to the statute, however, requires this Court to determine whether there are any circumstances in which the statute could be constitutional, which may in turn require an analysis of the scope of parental rights. As in *Michael H.*, such an analysis necessitates a review of the history and traditions from which parental rights arose.

B. This Nation's History and Traditions Establish that Parental Rights Are a Correlative of Parental Duties That Arise in the Context of Unitary Families.

Parental rights existed at early common law only in the context of the traditional family, consisting of married parents and their children. *See* Joan C. Bohl, *The "Unprecedented Intrusion": A Survey and Analysis of Selected Grandparent Visitation Cases,* 49 Okla. L. Rev. 29, 35 (1996). Blackstone's Commentaries reflect the view that reciprocal duties and privileges between parents and children are an inherent part of family life. The relationship between husband and wife, and between parent and child is "founded in nature." Moreover, the relationship between parent and child is inextricably linked to the union of the husband and wife by virtue of being "consequential to marriage ... and its principle end and design." 49 Okla. L. Rev. at 37 (quoting 1 William Blackstone, Commentaries 410). As Professor Bohl observes,

> for Blackstone, as for other common law authorities, a comprehensive set of mutual obligations and benefits running between

> parents and children lie within the realm of family life. Parents must first maintain their children, a duty imposed 'not only by nature herself' but by the parents' own 'proper act' in bringing children into the world. Blackstone notes that although the "laws of all well regulated states" enforce this obligation, the natural and insuperable degree of affection which providence awakens in the "breast of every parent" accomplishes this end more effectively than any law. Parents must also protect their children, a natural duty. Parents' final and most important duty is to give children "an education suitable to their station in life."

Id. at 37 (citing Blackstone's Commentaries).

The early common law view that parental rights are correlative of parental duties, as well as the right to marry, is reflected in a number of this Court's early decisions. In *Meyer,* for example, the Court coupled the right to marry with the right to bring up children. 262 U.S. at 399. Similarly, in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), this Court found the right to bear children to be inextricably linked with the right to marry. "Marriage and procreation are fundamental to the very existence and survival of the race." 316 U.S. at 541. In *Pierce*, this Court tied parental rights to parental responsibilities. Only those who "nurture [the child] and direct his destiny have the right, *coupled with the high duty,* to recognize and prepare him for additional obligations." 268 U.S. at 535 (emphasis added).

That parental rights are inextricably linked with parental duties and, to a lesser degree, an intact familial unit is also implicit in this Court's later decisions involving parental rights. In assessing the strength of family and parental rights, the Court has stressed the importance of

relationship and mutual responsibility among family members.

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," "basic civil rights of man."... It is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary *function and freedom* include preparation for obligations the state can neither supply nor hinder. The *integrity of the family unit* has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment.

Stanley v. Illinois, 405 U.S. 645, 651 (1972) (father who cared for and supported his children, as well as their mother, had parental rights) (emphasis added) (citations omitted). *See also Quilloin v. Walcott*, 434 U.S. 246 (1978); *Lehr v. Robertson,* 463 U.S. 248 (1983) (unwed fathers who shouldered no parental responsibilities had no parental rights); *Caban v. Mohammed*, 441 U.S. 380 (1979) (same); *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)(right to familial integrity may not be infringed by zoning ordinance barring grandmother from living with grandsons, whom she cared for and raised).

Finally, this Court's rejection of *Michael H.*'s parental rights claim properly tied parental rights with correlative parental duties, including the most fundamental duty of all, which is to bring a child into the world under circumstances which best enable a parent to fulfill his other responsibilities toward that child. Viewed in totality, this Court's cases are consistent with the common law view that parental rights are relational rights, based on reciprocal

duties, not on the individual interests of a parent. *See* Bohl, *supra*, 49 Okla. L. Rev. at 44.

In similar vein, the state historically has had no power to intrude into the relational rights between parent and child unless the parents harmed or threatened harm to the child. Neither the state's parens patriae power nor its police power may be exercised absent a determination that parental decisions will or may harm the child. This Court's decisions in *Yoder, Meyer*, *Pierce*, and *Prince* all reflect the historical view that only threatened harm to the child justifies state interference in the parent-child relationship. In *Yoder*, for example, this Court's decision was predicated on the determination that Amish children would not be harmed by receiving an Amish education, rather than a public education. 406 U.S. at 230 (state may intervene only "if it appears that parental decisions *will jeopardize the health or safety of the child, or have the potential for significant social burdens*") (emphasis added). Likewise, in *Pierce,* the Court held that the parents' decisions to send their children to parochial schools were not harmful to the children. 268 U.S. at 534; *see also Meyer,* 262 U.S. at 402-03 ("proficiency in a foreign language ... is not injurious to the health, morals, or understanding of the ordinary child"); *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 170 (1944) (mother's conviction under state child labor law was necessary to protect the child from harm). Of course, the state's power to terminate parental rights altogether hinges on a proceeding encased in substantial procedural protections to determine whether the parents have inflicted substantial harm on the child. *See, e.g., MLB v. SLJ*, 519 U.S. 102 (1996).

Petitioners argue that *Meyer, Pierce,* and *Yoder* are distinguishable because the infringement on parental rights in those cases was great, involving intrusions on the parents' right to control the religious upbringing and the education of their children. By contrast, petitioners claim that

Washington's visitation statute authorizes only a little intrusion because requiring visitation with third parties does not implicate the parents' prerogative to control the religious upbringing or the education of their children. Troxel Br. at 24-25. Petitioners' argument reveals a cramped and highly compartmentalized view of child-rearing. As any parent will attest, inculcating values, religious or not, and educating children necessarily require parents to exercise control over their children's associations. It is specious, if not disingenuous, to contend that forcing parents to maintain relationships between their children and third parties has no impact on "core" parental rights.

The requirement of harm is constitutionally essential to protect against state intrusion into the child-rearing decisions of fit parents in intact families. For the state to respect parental rights only as long as the state approves parental decisions is to emasculate parental rights. Because no finding of harm to the child is required, Washington's visitation statute allows state courts to second-guess parental determinations concerning the relationships children will maintain. The state thereby usurps the child's family's prerogative to influence the child's character and values by controlling the child's associations. Washington's visitation statute reflects a view of parental rights closer to Plato's ideal of children being raised by the state than to the historic sanctity accorded to the family in this Court's decisions. *See Meyer*, 262 U.S. at 390 (Platonic ideal of children raised by state does "violence to both the letter and spirit of the Constitution').

II. The Washington Supreme Court Properly Held that the State May Not Enforce a Third Party Visitation Order Against An Intact Family That Has Discharged Its Responsibility to Care for Its Children.

The lower court properly held that § 26.10.160(3) is unconstitutional as applied to Tommie Wynn. However unstable the Troxel childrens' beginning may have been, Ms. Wynn did not abdicate her responsibility for their care to another. The children now reside in an intact family with their mother and adoptive father. Consequently, there should be no diminution of Ms. Wynn's parental rights.

While the "best interests of the child" standard may be proper in some divorce-custody cases where state intervention is necessary because the parents can no longer agree to raise the children together in a stable family home, it is unconstitutional here. The lower court properly held that any state intrusion into Ms. Wynn's parental rights must be justified by a compelling state interest. Allowing state intrusion into the Wynn's private decisions about whom their children may visit because the state believes it would be in the children's "best interest" does not rise to the level of a compelling state interest. This Court has emphasized the rigor of strict scrutiny: "First Amendment rights are entitled to special constitutional solicitude," and the Supreme Court has "required the most exacting scrutiny" in cases where state action burdens a fundamental right. *Widmar v. Vincent*, 454 U.S. 263, 276 (1981). Strict scrutiny is not "watered ... down but really means what it says." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 545 (1992) (quotations omitted).

Thus, under strict scrutiny, only clear evidence of a threat of harm to the Troxel children could justify an award of visitation rights to the Troxels in this case. There has been no such showing in this case. The lower court correctly

held that § 26.10.160(3) is unconstitutional when applied to fit intact families, such as Ms. Wynn's.

CONCLUSION

Washington Rev. Code § 26.10.160(3) is an unprecedented expansion of state power to intrude into the child-rearing decisions of fit intact families. The lower court's decision holding the statute unconstitutional should be affirmed.

Respectfully submitted,

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Dated: December 9, 1999